Learned counsel had, as we have remarked earlier, likened the contributions made by the employer, and in certain instances, by the employee to payments made under an insurance policy.

In England pensions, whether payable as of right or discretionary or non-contributory are likewise not deductible (see *Kemp & Kemp* on The Quantum of Damages, Vol. 1 page 152).

Section 2 of the Law Reform (Personal Injuries) Act, 1948 is a statutory exception to the general principle and provides as follows:

"(1) In an action for damages for personal injuries (including any such action arising out of a contract), there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom *in respect of industrial injury benefit, industrial disablement benefit of sickness or invalidity benefit* for the five years beginning with the time when the cause of action accrued...." (The emphasis is ours).

In the absence of such statutory provision we must perforce hold that payments recovered by the appellant under the Act are, in common law, not to be taken into account so as to reduce the damages recoverable by appellant.

In view of the finding of the learned trial judge regarding damages, special and general, payable by the 1st respondent, we allow this appeal and order the 1st respondent to pay appellant $120,000 and the costs of this appeal.

Deposit to be refunded to appellant.

Order accordingly.

Solicitors: *Khoo & Sidhu; H.R. Sankey & Co.*

GO PAK HOONG TRACTOR AND BUILDING CONSTRUCTION v. SYARIKAT PASIR PERDANA

[F.C. (Wan Suleiman F.J., Salleh Abas F.J. & Hashim Yeop A. Sani J.) June 6 & September 17, 1981]

[Kota Bharu — Federal Court Civil Appeal No. 204 of 1980]

Practice and Procedure — Adjournment — Request for adjournment — Message by telegram — Defendant sick — Solicitor unable to catch plane to attend trial — Discretion of court.

This was an appeal from the decision of Mohammed Zahir J. reported in [1981] 1 M.L.J. 314. At the date of hearing in this case the defendants and their solicitors were absent. The solicitors for the plaintiffs mentioned the case and produced a telegram from the solicitors for defendants reading "Defendant fell sick. Unable to attend court tomorrow. Have applied postponement of hearing. Kindly mention for us as counsel in charge unable to obtain seat to fly to Kota Bharu. Letter follows." The learned trial disallowed the application for an adjournment and judgment in default was entered against the defendants — appellants. The appellants appealed.

Held, dismissing the appeal: the granting of an adjournment is in the absolute discretion of the court depending on the facts of each case and unless it can be shown that the discretion was improperly exercised it should not be disturbed.

Case referred to:-

(1) *Hup San Timber Trading Co. Sdn. Bhd.* v. *Tan Ah Lan* [1979] 1 M.L.J. 238.

FEDERAL COURT.

Tan Sun Cheong for the appellant.

Anthony Gomez for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J. (delivering the judgment of the Court): Although the argument in this appeal was confined to a point of small dimension it reflected the declining standards in the legal profession. Briefly, the facts of this unfortunate case can be summarised as follows. The respondent (plaintiff in the court below) claimed for payment of a sum allegedly due under an agreement executed with the appellant firm. The statement of claim was filed in the High Court at Kota Bharu on December 20, 1978. After the statement of defence was filed on March 26, 1979, the suit was fixed for hearing on August 17, 1980. Notice of trial was served on the appellant's solicitors on March 20, 1980. As shown in the record of proceedings on the date fixed for hearing the plaintiff's counsel was present but both the appellant and counsel were absent. Counsel for the plaintiff tendered in court a telegram which he had received from appellant's counsel which read as follows: —

"Defendant fell sick. Unable to attend court tomorrow. Have applied postponement of hearing. Kindly mention for us as counsel in charge unable to obtain seat to fly to Kota Bharu. Letter follows. Ngan and Tan."

Not surprisingly the learned judge was taken aback and the following note appears in the record of proceedings:

"The defendants' solicitors had been notified of the date of trial as early as 20th March, 1980. They should have booked the passage earlier. There is no proper medical report from the defendant. (Telegram marked D1)

I disallowed the application for adjournment."

Judgment in default was entered against the defendant in the sum of $63,606.98 and interest at the rate of 6% per annum from date of judgment until realization and costs. The defendant appealed.

In his argument appellant sought to rely on *Hup San Timber Trading Co. Sdn. Bhd.* v. *Tan Ah Lan.*[1] In that case this court held that since the judge was in some doubt as to the real reason behind the appellant's absence an adjournment should have been allowed and any delay occasioned thereby could be compensated by an award of appropriate costs. We hasten to emphasise that *Hup San Timber Trading Co. Sdn. Bhd.* v. *Tan Ah Lan* is distinguishable as clearly shown in the judgment at page 238 that it was only on occasions of doubt such as reflected on the facts of that case that the guiding principle should be that both parties should be given an opportunity to be heard and any delay occasioned by the adjournment could be compensated by an award of appropriate costs.

The granting of an adjournment is in the absolute discretion of the court depending on the facts of each case. Unless it can be shown that the discretion was improperly exercised it should not be disturbed. The facts of the present case clearly show a lackadaisical attitude towards lawyers' duty to their clients and their duty to the courts. As stated in the grounds of judgment of the learned judge the case had been

fixed for hearing about 5 months previously and suddenly on the date of hearing a telegram was received stating not only that counsel was unable to obtain a seat in the plane but also the defendant suddenly fell sick. One should also consider the difficult position of the courts in circumstances such as the present case. Here the learned judge has also stated that although he had entered judgment in default it would still be open for the appellant to apply to the court to set aside the order upon giving valid reasons. Unfortunately no such application was ever made to the learned judge.

Looking at the facts of this case we did not consider it proper to interfere with the order made by the learned judge and therefore dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Ngan & Tan; A. Gomez & Co.*

TENGKU AZMI BIN TENGKU YUSOFF & ANOR. v. TENGKU AHMAD BIN TENGKU ABDUL GHAFFAR & ORS.

[F.C. (Wan Suleiman Ag. C.J. (Malaya), Salleh Abas F.J. & Hashim Yeop A. Sani J.) June 6 & September 17, 1981]

[Kota Bahru — Federal Court Civil Appeal No. 89 of 1980]

Practice and Procedure — Res Judicata — Application to set aside sale by private treaty — Application dismissed — No appeal — Objection to confirmation of sale.

In this case by a consent order it had been ordered that all the immovable properties of Tengku Mariam bte. Tengku Ahmad be sold by private treaty among the beneficiaries of the estate at prices not less than the valuation prices. The respondents were successful in the bid for all the properties except two pieces of land. The appellants filed a summons in chambers to have the order set aside on the ground that (a) no attempt was made to call the beneficiaries for any meeting or negotiations for a private treaty and (b) there was no public tender for the sale of the properties. This application was dismissed by the learned Judge. An appeal was lodged by the appellants but this was withdrawn.

Subsequently the respondents applied for the confirmation of the sale. The appellants objected on the grounds that (a) no attempt was made to call the beneficiaries to any meeting or negotiation for a private treaty and (b) no valuation report was enclosed in the affidavit. The learned Judge allowed the application of the respondents. The appellants appealed.

Held, dismissing the appeal: the learned Judge was correct in holding that the plea of *res judicata* raised by the respondents should succeed.

Case referred to:-

(1) *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459.

Cases cited: *Chung Guat Hooi* v. *G.H. Goh* [1954] M.L.J. 131; *Lee Sem Yoong* v. *Leong Yoong* [1967] 2 M.L.J. 86; *Lim Thong Eng* v. *Sungei Choh Rubber Co. Ltd.* [1962] M.L.J. 15.

FEDERAL COURT.

A. Gomez for the appellants.

Foo Say Ghee for 1st respondent in personal capacity.

Ang Kiang Leng for 1st respondent as administrator.

Aria Ratnam for the Official Administrator.

Cur. Adv. Vult.

Wan Suleiman Ag. C.J. (Malaya) (delivering the judgment of the Court): By a consent order made on December 4, 1978 the learned judge ordered that all immovable properties of Tengku Meriam bt. Tengku Ahmad, deceased as set out in the order be sold by private treaty among the beneficiaries of her estate and also among the beneficiaries of the estate of Tengku Som bt. Sultan Ahmad, deceased including the beneficiaries of the estate of Che Bidah bt. Abdul Rahman, deceased, at prices not less than "the present valuation to be given by the Director of Valuation, Kelantan or the valuation given by Asian Appraisal (Malaysia) Sdn. Bhd. in 1977 whichever are greater", and if this is not successful

(ii) by public tender at the prices not less than the prices abovementioned and if this is not successful

(iii) then by public auction at prices not less than the reserve prices to be fixed by the court.

A notice Tawaran (private tender) dated July 28, 1979 was then issued by the S.A.R. closing originally on August 29, 1979 and later altered to September 2, 1979, the conditions of tender being set out in the Surat Tawaran (at pages 65 and 66 of the appeal record). It gave a list of the properties and the reserve prices determined in the manner set out in the consent order, and was sent under sealed cover to each of the beneficiaries, inviting any beneficiary who wished to tender to do so at a price not less than the reserved price stated in the notice tawaran, and to accompany each tender with a cheque to the amount of 10% of the sum tendered.

Tengku Ahmad bin Tengku Abdul Ghaffar, Tengku Amri bin Tengku Yusoff, Tengku Mohamed bin Tengku Yusoff and Tengku Juhan Ariffin bin Tengku Yusoff tendered. Tengku Ahmad bin Tengku Abdul Ghaffar was successful in the bid for all the properties except for 2 pieces of land. The latter went to Tengku Juhan Ariffin. The present appellants failed to tender. The Assistant Official Administrator, Kelantan as representative of the estate of Tengku Som bte. Sultan Ahmad did not tender but agreed to the procedure adopted.

The appellant filed a summons-in-chambers on September 27, 1979 to have the order set aside on the grounds that: —

(1) No attempt was made to call the beneficiaries for any meeting and/or negotiations for a private treaty.

(2) There was no public tender for the sale of the said properties.

This application to set aside was dismissed by the learned judge for the reasons set out in his grounds, the substance of which is that since there is no set procedure as to how sale by private treaty is to be conducted, it is not incumbent on the S.A.R. to call for a meeting of the beneficiaries for the purpose of negotiating the sale of the various items of property. The learned judge considered that the manner in which the present sale by private tender had been conducted amounts, in effect, to a sale by private treaty.

Against this dismissal the appellants appealed.